Filed 11/20/08 Marriage of Rothe CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of FRANK A. and DANIELLE ROTHE.	B202733 (Los Angeles County Super. Ct. No. MD029016)
FRANK A. ROTHE, JR., Appellant, v. DANIELLE STODDARD, Respondent.	

APPEAL from orders of the Superior Court of Los Angeles County, Carlos P. Baker, Jr., Judge. Reversed and remanded.

Law Offices of Robert E. Brode and Robert E. Brode for Appellant.

Linda T. Barney for Respondent.

Frank A. Rothe appeals from orders requiring that he pay his former wife's attorney fees in the amount of $92,552.86 in a lump sum. We conclude that the trial court failed to exercise discretion when it awarded $92,552.86 in attorney fees without consideration of the requisite statutory factors, and that the court abused its discretion by ordering payment in a lump sum. We reverse the orders, and remand for further proceedings.

FACTUAL AND PROCEDURAL SUMMARY

Frank Rothe and Danielle Rothe (now Danielle Stoddard)[1] married in 1997; judgment of the dissolution of their marriage was entered in 2005. After the dissolution, both parties resided in California and shared joint physical and legal custody of their two children. In February 2006, Danielle moved for an order to show cause, requesting modification of the judgment so that she could move with the children to Colorado Springs, Colorado, where her then-fiancé (now husband) resides. Her application for the order included a request for attorney fees. In August 2006, Frank filed his own motion for an order to show cause, requesting a reduction in child support and asking that he be awarded primary physical custody if Danielle moved out of state.

The combined hearing on the motions commenced in January 2007, was continued over multiple days, and concluded in April 2007. Most of the hearing was devoted to the move-away issue, but some testimony was elicited from Danielle about her finances, in part because of her attorney fees request. Frank's closing argument included a single sentence asking that Danielle's attorney fees request be denied; Danielle's closing argument did not mention the fee request at all. No other hearing was held to address the issue of attorney fees.

On May 4, 2007, the trial court issued a tentative ruling in favor of Danielle, including an award of attorney fees in an unspecified amount. The minute order directed Danielle to submit a cost bill. In June 2007, Danielle filed an itemized billing statement

---

[1] For convenience, we refer to the parties by their first names.

for all work done up to that time and a sworn declaration from her attorney. Frank filed written opposition, arguing that the amount requested was not reasonable.

Before the final order was entered, both parties sought ex parte relief in connection with Danielle's wish to leave California with the children before school started. At the July 31, 2007 hearing on the motions, the court announced its intention to immediately sign the order and statement of decision Danielle had prepared in connection with the May 4 tentative ruling. In addition to modifying the custody arrangement to allow Danielle to move the children to Colorado, the order specified an award of $88,552.86 in attorney fees for Danielle, payable as a lump sum. Frank objected on multiple grounds, including the lack of a hearing on the issue of attorney fees and the fact that the period to file objections to Danielle's proposed statement of decision pursuant to California Rules of Court, rule 3.1590(f) had not yet run. The trial court refused to entertain argument on these issues, repeatedly telling Frank to take up his objections on appeal. The court signed the order and statement of decision at the hearing.

On September 14, 2007, the trial court signed a second order, this one in connection with the July 31, 2007 ex parte hearing. This order awarded Danielle a lump sum of $92,552.86 in attorney fees. An attachment to the September 14 order explained that the amount of $92,552.86 was a composite of the $88,552.86 awarded on July 31 plus an additional $4,000 for the July 31 hearing.

Frank timely appeals the award of attorney fees. He does not challenge the underlying custody decision.

DISCUSSION

I

As a preliminary matter, we must determine the scope of this appeal. The parties agree that the July 31, 2007 order that Frank pay $88,552.86 is properly before this court. They disagree over whether the September 14, 2007 order awarding an additional $4,000 in attorney fees has been appealed. Frank's notice of appeal refers only to the order entered on July 31, 2007. Because of this, Danielle argues that we should not consider Frank's challenge to the additional $4,000 in fees ordered September 14. While

acknowledging that California Rules of Court, rule 8.100(a)(2) requires the notice of appeal to be liberally construed, Danielle argues that the September 14 order was a separate judicial act and must thus be independently appealed. Frank's position is that the portion of the September 14 order dealing with attorney fees simply reaffirmed and updated the award of fees made on July 31.

"Analysis of [this] issue invokes conflicting policy considerations. First, there is the general rule that notices of appeal should be construed in favor of sufficiency . . . . In direct contrast is the rule that the failure to appeal an appealable order forecloses review." (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 997.) *Grant v. List & Lathrop* held that an appeal from an order that awarded costs but did not specify the amount of the costs subsumed a later order that set the amount of costs. (*Id*. at p. 998.) The court reasoned that the notice of appeal challenged the appropriateness of awarding fees and costs, putting the respondents on notice that appellant was seeking review of the award. (*Ibid*.)

Similarly, Danielle was put on notice that Frank was challenging the award of attorney fees by his appeal from the July 31 order. Both the July 31 order and the September 14 order arose out of the same underlying dispute regarding child custody. The July 31 order specified that attorney fees in the amount of $88,552.86 were awarded to Danielle. The September 14 order then awarded Danielle a composite amount of $92,552.86 in attorney fees. Attachment 1 to the September 14 order contains the following explanation: "The Court reaffirms its Orders for Petitioner's attorneys fees payable by Respondent, to the Law Offices of J. Michael Kelly in the amount of $90,000 (actual amount is $88,552.86 plus $4,000.00[2] for 07/31/07, with a total of $92,552) in one

---

[2] In the supplemental briefing requested by this court, Danielle contends that she was awarded $4,225, rather than $4,000, on September 14. This is not borne out by the record. Although Danielle requested $4,225, the September 14 order awarded $4,000.

lump sum payable forthwith."[3] Attachment 1 also states, "Petitioner' [*sic*] visitation and custody orders are delineated in the Findings and Order signed by the court *today, (07/31/07)* . . . . [¶] The Court is signing the Statement of Decision *today (07/31/07)* . . . . [¶] The Court is signing the Findings and Order After Hearing *today (07/31/07).*" (Italics added.) The use of the word "reaffirms" and the repeated references to July 31 as the current date indicate that the second order was a final aggregate order that contemporaneously modified the first order.

Since Danielle prepared the September 14 order, including Attachment 1, she had notice of the order's characterization of the additional amount as a modification of the original. She is not prejudiced by a liberal reading of the notice of appeal to encompass the September 14 order. We disregard the inaccurate date on the notice of appeal and treat the appeal as coming from the comprehensive September 14 order awarding attorney fees in the amount of $92,552.86.

II

The trial court issued a Code of Civil Procedure section 632 statement of decision regarding the July 31 order, but included no findings with respect to attorney fees. No statement of decision was issued regarding the September 14 order. For this reason, Danielle urges us to imply all necessary findings in her favor. In the absence of a statement of decision on any issue, "[t]he doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment." (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.)

Frank argues that the doctrine of implied findings is not applicable to this case because there was a statement of decision in connection with the July 31 order. Frank does not claim that he made a timely request for a statement of decision himself, but

---

[3] The explanation of the fee award in Attachment 1 creates some confusion as to whether the total amount awarded is $90,000 or $92,552. We assume the actual award is $92,552.86, since that amount appears on the first page of the order. Additionally, the parties appear to be reversed in the passage cited. Frank was the petitioner and Danielle was the respondent in the proceeding. Neither party argues that the aggregate award was $90,000 or that these errors have any legal significance.

instead relies on Danielle's request for a statement of decision. This reliance is misplaced. Although Danielle requested a statement of decision, attorney fees were not among the issues she specifically asked the court to address. A statement of decision need only discuss those issues whose inclusion was timely and specifically requested. (Code Civ. Proc., § 632; *In re Marriage of Hebbring* (1989) 207 Cal.App.3d 1260, 1274.)

Frank contends he satisfied the requirements for avoiding waiver by bringing specific deficiencies in the proposed statement of decision to the attention of the trial court, as provided for by Code of Civil Procedure section 634. Both sections 632 and 634 of the Code of Civil Procedure must be satisfied in order to avoid waiver of a statement of decision. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1134.) Frank cannot compensate for the fact that neither party requested a statement of decision on the issue of attorney fees by waiting until the statement is issued, then raising an objection under Code of Civil Procedure section 634. Frank waived a statement of decision on the issue of attorney fees. As we shall explain, however, it is clear from the record that the trial court failed to exercise discretion when awarding attorney fees to Danielle. Consequently, the order cannot be affirmed despite our application of the doctrine of implied findings.

III

An award of attorney fees in a dissolution case is intended to achieve "'"parity between spouses in their ability to obtain effective legal representation."'" (See *In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866; Fam. Code, §§ 2030 & 2032.)[4] Section 2030, subdivision (a)(1) directs courts to achieve this goal "by ordering, if necessary based on the income and needs assessments, one party . . . to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the

---

[4] All further statutory references are to the Family Code unless otherwise indicated.

pendency of the proceeding."[5] The determination of which party shall pay attorney fees and what amount shall be paid should be based on "(A) the respective incomes and needs of the parties, and (B) any factors affecting the parties' respective abilities to pay." (§ 2030, subd. (a)(2).) The amount of fees awarded must be reasonable. (§ 2032.) "'The major factors to be considered by a court in fixing a reasonable attorney's fee [include] "the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded [citation]; the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed."'" (*In re Marriage of Keech*, *supra*, 75 Cal.App.4th at p. 870.) Whether to award attorney fees pursuant to section 2030 is within the discretion of the trial court. (*Id*. at p. 866.)

Frank contends the trial court failed to comply with sections 2030 and 2032 when it ordered him to pay Danielle's attorney fees. In the absence of a statement of decision, our review is limited to determining whether the court's implied findings are supported by substantial evidence and whether the court acted reasonably in exercising its discretion. (See *In re Marriage of Hebbring*, *supra*, 207 Cal.App.3d at p. 1274; see also *In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 197 ["To the extent that a trial court's exercise of discretion is based on the facts of the case, it will be upheld 'as long as its determination is within the range of the evidence presented.'"].) "'[T]he trial court's

---

[5] In his opening brief, Frank suggests the attorney fee award may have been made pursuant to section 271, which allows attorney fees to be awarded as a sanction against the party or attorney who is required to pay. Frank points out that sanctions under this section would be improper because he was given neither notice nor an opportunity to be heard on the issue of sanctions, as required by section 271, subdivision (b). Due to the undisputed lack of notice and a hearing on the issue of sanctions, Danielle concedes that section 271 may not be the basis for the trial court's award of attorney fees. Since there is no statement of decision on the issue of attorney fees, we will uphold the trial court's order if it is correct under any legal theory. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647.) Consequently, our discussion presumes that attorney fees were awarded to Danielle pursuant to section 2030.

order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made.'" (*In re Marriage of Keech*, *supra*, 75 Cal.App.4th at p. 866.) Nonetheless, "'the record must reflect that the trial court actually exercised [its] discretion, and considered the statutory factors in exercising that discretion.'" (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 315.)

We disagree with Frank's contention that there was not substantial evidence before the trial court from which it could have made the requisite findings pursuant to sections 2030 and 2032. The trial court had received a number of income and expense declarations from each of the parties. Danielle also testified about her financial circumstances during the hearing. After the court announced a tentative decision to award fees to Danielle, she submitted an itemized billing statement for work done up to that point and a sworn declaration from her attorney attesting to such matters as the difficulty of the work and the skill and experience of the attorney. Thus, there was substantial evidence before the court regarding the needs and income of the parties and the reasonableness of the fees Danielle requested.

The trial court's exercise of discretion with regard to this evidence is a different matter. Frank contends that the trial court's decision does not reflect consideration of the guidelines set forth in statutory and case law. We agree. Our conclusion that the trial court did not exercise discretion in awarding Danielle $92,552.86 in attorney fees arises from the combination of two troubling circumstances. First, the trial court failed to assess Danielle's fee request in light of the factors laid out in sections 2030 and 2032 before making the fee award. Second, the court's order that Frank pay Danielle's attorney fees in a lump sum was unsupported by evidence he had the ability to do so.

Danielle asserts that the decision of the trial court is entitled to a presumption of correctness, and indeed, "[o]n a silent record, the 'trial court is presumed to have been aware of and followed the applicable law' when exercising its discretion. [Citations.] The appellate court cannot presume error where the record does not establish on its face

that the trial court misunderstood the scope of its discretion." (*In re Jacob J.* (2005) 130 Cal.App.4th 429, 437-438.) In this case, however, the record is not silent.

The trial court abruptly announced its intention to sign the order awarding Danielle attorney fees of $88,552.86 at the end of an ex parte hearing on another matter. Neither party expected attorney fees to be addressed during that hearing. The following exchange between the trial court and the parties reveals a lack of consideration of the statutory factors by the court:

> "MS. DOHERTY [Frank's attorney]: . . . The respondent [Danielle] has asked that petitioner [Frank] pay for all of child support of 1300 a month, all of transportation costs, which are a thousand a month, plus attorney fees of 90,000 . . . and it provides that he pay all of the attorney fees in a lump sum, Your Honor. None of that was discussed. We would at least want a hearing on that visitation issue and on the child support issue and on the attorney fee issue. . . .
>
> "THE COURT: Do you want a hearing on it?
>
> "MS. VAUX [Danielle's attorney]: No
>
> "MS. DOHERTY: We want a hearing on it, Your Honor.
>
> "MR. EKERLING [Frank's attorney]: The code requires it.
>
> "THE COURT: Just a minute. I'm making rulings. You people want a ruling. You've come to court. The ruling is denied, and I'm going to grant your request, and we'll get on with this. [¶] . . . [¶]
>
> "MS. DOHERTY: . . . Are you ruling on attorney fees and transportation costs?
>
> "THE COURT: Is that what you are requesting?
>
> "MS. VAUX: Yes.
>
> "MR. EKERLING: There's no cost bill.
>
> "THE COURT: Take it from there. I'm not running this case, and I'm not taking it on appeal. That's up to you.

"MR. EKERLING: There is no factual basis for the fees. There is no 2030.

"MS. VAUX: That is not before the court today on an ex parte basis.

"MR. EKERLING: But you've signed an order that says he must pay $90,000. There is no hearing—there [are] no findings under 2030. This [is] family law, not civil.

"THE COURT: I think you can object to anything that the court does and apparently you do. [¶] . . . [¶] . . . You want another hearing on it?

"MS. DOHERTY: Yes, we do.

"MS. VAUX: No, we do not.

"MS. DOHERTY: And we should have a right to have a hearing on it.

"MR. EKERLING: They should file a cost bill. Even if this were a civil case, if they want fees, they have to file a cost bill. We have a right to—

"THE COURT: You have a lot to do. I'm moving with what she has. If she's wrong, she can get reversed, because all you do is object to everything that it takes to move to Colorado . . . [¶] . . . [¶]

"MS. DOHERTY: We're objecting to $90,000 in attorney fees in a lump sum because it's impossible for him to pay it. Are you ordering that?

"THE COURT: You're asking—

"MS. VAUX: Yes, I'm asking for it. That's not even before the court; with regard to this hearing before the court, written, yes, I'm asking for it.

"THE COURT: Okay. Granted.

"MS. DOHERTY: Your Honor, can we have a hearing? Are you going to make a hearing?

"THE COURT: Right now, I'm not making a hearing. You'll have to file a motion and get her down here. But, you know, it just seems that everything that's going on here is an objection to anything that sounds reasonable, and the court just can't deal with you on what you intend to file. I can be reversed on every ruling I make."

Each time Frank raised an objection, the trial court asked Danielle what she wanted and summarily granted her requests. It appears the court even deferred to Danielle's legal analysis, saying, "I'm moving with what she has. If she's wrong, she can get reversed . . . ." Needless to say, it is not Danielle's analysis that we review on appeal. (See *In re Marriage of Keech*, *supra*, 75 Cal.App.4th at p. 871 [finding an "abdication of the judicial function" when the trial court approves an attorney fees request without scrutiny].) The court gave no indication that it had independently considered the governing statutory and case law, and it ignored Frank's request that it analyze the parties' needs and abilities to pay as required by section 2030. The court repeatedly responded to Frank's objections by telling him he could take the matter up on appeal, yet the duty to exercise discretion regarding section 2030 attorney fees lies first with the trial court, not the appellate court. A refusal to exercise this discretion is a departure from the trial court's role. (See *In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 1219.)

The additional $4,000 attorney fee award was granted in the September 14 order resulting from the July 31, 2007 hearing. It was at the July 31 hearing that the trial court failed to exercise discretion with regard to attorney fees. Thus, the additional $4,000 award was the product of the same flawed process as the original $88,552.86 award.

The order that Frank pay the fees in a lump sum also supports our conclusion that the trial court abused its discretion when awarding attorney fees. A trial court must determine whether a party is reasonably likely to have the ability to pay when deciding whether to order payment of attorney fees in installments or a lump sum. (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 531-532.) In making this determination, the court should consider whether the party has savings or liquid assets from which to pay a lump sum. (*Ibid*.) In the income and expense declaration filed less than a month before being ordered to pay the lump sum, Frank's only substantial asset was real estate valued at $100,000. He reported no savings account or other liquid assets. His monthly expenses of about $8,645 exceeded his average monthly income of about $6,324. Danielle does not contend that there are other assets in the record from which Frank could pay the award of $92,552.86 in a lump sum. Thus, there is no substantial evidence to support the

trial court's implied finding that Frank had the ability to pay the award in a lump sum. "[A] court abuses its discretion if its findings are wholly unsupported, since a consideration of the evidence 'is essential to a proper exercise of judicial discretion.'" (*In re Marriage of Ackerman*, *supra*, 146 Cal.App.4th at p. 197.) The order that the fees be paid "forthwith" was an abuse of discretion.

Frank seems to take the position that the trial court always must hold a separate hearing on the issue of attorney fees under section 2030. To the contrary, appellate courts have recognized that "practices vary widely with respect to fee request submissions." (*In re Marriage of Cheriton*, *supra*, 92 Cal.App.4th at p. 316 [describing a variety of procedures by which trial courts manage attorney fee requests in family law cases].) Any procedure adopted, however, must be fair and should give the parties notice of when the matter of attorney fees will be deemed submitted, unlike what took place in the present case. (See *id*. at p. 317.)

The trial court failed to exercise discretion when it awarded $92,552.86 in attorney fees without consideration of the parties' needs and abilities to pay and whether the fees incurred were reasonably necessary. The court also abused its discretion by ordering payment in a lump sum. The trial court's failure to exercise its discretion within the statutory guidelines of sections 2030 and 2032 constitutes reversible error. (See *In re Marriage of Keech*, *supra*, 75 Cal.App.4th at pp. 868-869 [reversible error for trial court to award attorney fees to wife in large monthly payments when record showed husband lacked sufficient monthly income to make large payments and no findings were made regarding reasonableness of amount of fees].) While the trial court may ultimately resolve the matter of attorney fees in Danielle's favor, it may do so only after making the determinations required by sections 2030 and 2032.

DISPOSITION

The order is reversed, insofar as it directs Frank to pay Danielle's attorney fees in the amount of $92,552.86, and insofar as it directs that payment be made in a lump sum. The case is remanded to the trial court for the determinations required under sections

2030 and 2032. Any resulting attorney fee award shall be payable in manageable installments, consistent with Frank's ability to pay.

The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.